

IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHARLES McFALL and
JENNIFER McFALL

Plaintiffs

v.

JOHN MARIONI, MARY MARIONI,
and M&D PLUMBING

Defendants

Civil Action No. 2003-03-489

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DECISION AFTER TRIAL

Plaintiffs are the owners of a residential dwelling which they purchased from the defendants Marioni. They seek damages from these defendants for an alleged defective septic system and from defendant M&D Plumbing who inspected the system prior to closing on the agreement of sale. This is the Court's decision after trial.

The Court finds the following facts on the record: The dwelling at 128 Netherland Drive in Middletown, Delaware, was owned by John and Mary Marioni (herein defendants or Marionis) for thirteen years before it was sold to Charles and Jennifer McFalls (herein plaintiffs or McFalls) on February 27, 2002, under a contract of sale executed on January 7, 2002. The Marionis prepared a "Seller's Disclosure Report" which was tendered to the McFalls before the sale contract was signed. The disclosure report included a question, (No. 79), whether there are "... any leaks, backups, or other problems relating to any of the plumbing, water and sewer related items?" The Marionis answered "No" to the question.

The sales agreement gave the McFalls an option to have the septic system inspected prior to closure. The system was inspected by defendant M&D Plumbing (herein defendant or M&D), retained by the McFalls, on January 18, 2002. This was prior to a deadline date in the sale agreement. The inspection did not report any problem with the septic system.

The McFalls moved into the property shortly after February 27, 2002. In October, 2002, they had a problem with the septic system when there was a backup of several inches of water in the basement. The system worked properly in the preceding months. The system caused further problems and was replaced with a new system in the Spring of 2003.

Additional findings of fact will be made in the Court's analysis and conclusion.

The McFalls charge the Marionis with breach of contract, promissory estoppel and negligent misrepresentation of a material fact. (Although pled, Plaintiff's abandoned a claim for fraud.) They argue that Marionis did not meet the requirements of 6 Del. C. §2574¹ because they failed to disclose an existing problem with the septic system when they answered "No" to question 79 on the Seller's Disclosure Report. They argue that Marionis did not show a good faith effort to disclose a material defect.

The Plaintiff's claim against the Marionis rests basically on evidence that the Marionis had the septic system serviced at least four times during the thirteen years they owned the property. The system was serviced in December 1996, March 1997, January 1998, and November 2001. All service was done by the same provider. Plaintiffs also point to a failure by the Marionis to disclose a fire in October 2000, as evidence of a mindset to prove negligence and misrepresentation.

Rosenberg v. White, 2003 WL 22931396 at p.3 (Del. Com. Pl.) cautions that to prevail on a claim of negligent misrepresentation the claimant must prove that the

¹ Title 6 Del. C. Subch. VII establishes the "Buyer Property Protection Act", and provides, §2572(a), that a seller of residential real property shall disclose in writing to the buyer "... all material defects of that property that are known at the time the property is offered for sale or that are known prior to the time of final settlement." and also provides, §2574, that the required form is "... a good faith effort by the seller to make the disclosures required by this subchapter, and is not a warranty of any kind ... and is not a substitute for any inspections or warranties that the seller or buyer may wish to obtain."

defendant 1) had a pecuniary duty to provide accurate information, 2) provided inaccurate or false information, 3) did not exercise reasonable care in obtaining or communicating such information, and this 4) caused damage when claimant justifiably relied on such inaccurate or false information. Lack of proof of any one of the four elements will defeat the claim for negligent misrepresentation. *Darnell v. Myers*, 1998 WL 294012 at p.5 (Del. Ch.).

The Court finds and concludes that the record does not show that the data given to the McFalls in the disclosure statement was either false or inaccurate. The service calls for the septic system while the Marionis owned the property were routine maintenance procedures and cannot be construed as “leaks, backups or other problems” in the septic system which would require a reasonable person to answer “Yes” to the question posed on the issue in the disclosure report. All of the invoices covering the work done by Weaver Sanitation, who provided the maintenance service to the Marionis, state the service was for “pump and clean septic tank” and do not mention any problem with the septic system. The one incident that could be perceived as a “problem”, the water backfill in the washing machine in 1997, was too far removed in time to be a “problem” dictating needed disclosure and was followed by a long period of time when no further “problem” was evident. The issue of failure to note a minor fire in the inspection report adds nothing to Plaintiffs’ claim.

The McFalls contract claim does not rise higher than the claim for negligent misrepresentation. The Marionis fulfilled their responsibility under 6 Del. C. §2574. There was no material problem or defect in the septic system apparent to them when they

executed and presented the disclosure statement to the McFalls. Their actions do not show any breach of their contract with the McFalls.

The sales agreement provided for an inspection of the septic system at the buyers option and then provided procedures to be followed if any defects or problems were found. Under this agreement the Marionis were entitled to know of any alleged defect in the septic system after plaintiffs had the system inspected. There was no report of a defect. The McFalls have not shown reason to support their contract claim against the Marionis. See *Weir v. Manerchia*, 1997 WL 74651 (Del.Ch.).

Plaintiffs' claim under a theory of promissory estoppel has not merit.

The evidence shows a clear and detailed written contract between the parties and their duties, rights and obligations can be determined from that contract. The evidence does not show any basis to go beyond the contract. See *Harvey Corp. v. Guyer*, 226 A 2d 231 (Del. Supr. 1967).

Plaintiff's claim against M&D Plumbing charges a breach of contract for inspection of the septic system in January 2002, and/or negligence in the execution of the contract.

The Plaintiffs did not show that there was an explicit warranty or guarantee attached to the inspection. Basically, the contract for the inspection was to determine if the system was operating or functioning without a problem. The Court concludes that the septic system was operating and functioning properly on the date of the inspection.

The system operated properly from at least February to October 2002. The last service provided to the Marionis in November 2001, did not report any problem. The invoice covering service to the septic system for the McFalls in October 2002, did not

state there was problem with the system, and, significantly, provided “suggest re-pump in Fall 05”.

There was a difference of opinion in the testimony as to what should or should not be done at an inspection of a septic system and there was conflict in the testimony as to what was done by M&D Plumbing during the inspection in January 2002.

The evidence strongly suggests that in a septic system which is not new that no exact measure can be applied as to when it may or will fail. The opinions varied rather widely and, as stated by Plaintiffs’ witness, Michael Roscoe, the systems can fail almost anytime without prior warning.

The record does not support a finding by preponderance of evidence that M&D Plumbing breached its contract with the McFalls or that it was negligent in executing that contract.

Judgment is entered in favor of the Defendants Marioni and M&D Plumbing with costs assessed to the Plaintiffs.

IT IS SO ORDERED.

Alfred Fraczkowski, Judge
Retired²

² Sitting by appointment pursuant to Del. Const.; Art IV §38 and 29 Del. C. §5610.